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August 25, 1993

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AUG 30 1993

FCC - MAIL ROOM

William E. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-18
RM No. 8173
FM Rulemaking Proceeding
Coos Bay, Oregon

Dear Mr. Caton:

There is transmitted herewith, on behalf of C & C Broadcasting, Inc., an original and four (4) copies of "Comments on Petition for Reconsideration" submitted in the above referenced FM rulemaking proceeding.

An extra copy of this filing is enclosed. Please date stamp this copy to confirm your receipt of its filing and return it to the undersigned counsel. A pre-addressed stamped envelope is enclosed for this purpose.

Respectfully submitted,

J. Dominic Monahan
J. Dominic Monahan

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments)

FM Broadcast Stations,)
(Coos Bay, Oregon))MM Docket 93-18
RM N6. 8173

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To: The Commission

AUG 30 1993

COMMENTS ON PETITION
FOR RECONSIDERATION

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C & C Broadcasting, Inc., ("C & C") through its counsel, respectfully submits its Comments on the Petition for Reconsideration filed by Kenton E. Sturdevant, ("Petitioner" or "Sturdevant") in the above referenced proceeding, seeking the allocation of Channel 271A to Coos Bay, Oregon. In support, the following is shown:

Standing

C & C is an applicant before the Commission seeking its consent to the assignment of the license and related authorizations of Station KGAL-FM, Brownsville, Oregon, from Eads Broadcasting Corp ("Eads"). (See BAPH-921216GJ) Incident to the proposed sale and assignment of the KGAL(FM) license, an application was filed by Eads, as an accommodation to C & C, seeking a construction permit to relocate the transmitter site of Station KGAL(FM) while implementing the upgrade of its facilities to a Class C-1 channel. (See BMPH-930222IG, originally submitted as BMPH-930107IE). Thus, petitioner's objections to the proposed upgrade and site relocation of Station KGAL(FM) adversely affects the interests of C & C. Accordingly, C & C has standing in this proceeding FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

Background Statement

Petitioner filed a petition with the Commission on January 15, 1993 seeking to allocate Channel 271A to Coos Bay, Oregon. Petitioner claims the selection of Channel 271A was carefully considered in order to avoid conflict with present FM channel assignments and short-spacing with existing or proposed stations,

including existing and proposed FM translator operations.¹

In response to the rulemaking request, the Commission's Allocations Branch adopted a Notice of Proposed Rulemaking ("NPRM") on January 29, 1993, soliciting comments on the petitioner's proposal (See NPRM in MM Docket 93-18, released February 17, 1993). At the time of the adoption of the NPRM, the upgrade proposal of Station KGAL(FM) remained pending before the Commission. Five days later, on February 3, 1993, the Commission's Fee Section returned the KGAL(FM) upgrade application for failure to include the fee for the earlier rulemaking proposal which had resulted in the channel upgrade.

On June 25, 1993, the Chief of the FM Allocations Branch released a Report and Order (DA 93-719 in MM Docket 93-18) allocating Channel 228A to Coos Bay in substitution of the requested channel 271A. This action was taken after the Commission concluded that Coos Bay warranted the addition of a third FM channel. However, instead of allocating Channel 271A, the staff selected Channel 228A as an alternative channel in order to accommodate the pending upgrade application of Station KGAL(FM). The staff's decision to allocate an FM channel to Coos Bay other than the one requested by Mr. Sturdevant was fully consistent with the Commission's policies set forth in Patterson, California, 7 FCC Rcd 1719 (1992).

Mr. Sturdevant now complains that Channel 228A will not do; that only Channel 271A will serve his purposes. In support, he claims he was never consulted by the FCC regarding its decision to use an alternative channel; that the use of Channel 228A in Coos Bay will force Station KWAX(FM), licensed to Eugene, Oregon, to discontinue its operation of FM Translator Station K228CW in Coos Bay; ² that the use of Channel 228A in Coos Bay will prohibit the planned expansion of service by Station KWAX(FM) to Reedsport,

¹ Although the original upgrade application of KGAL(FM) was on file with the Commission at the time of Mr. Sturdevant's filing, he claims the application was "not available as a matter of Public Record at the time ...[he]... conducted an allocation study and made the application..." Since Mr. Sturdevant does not disclose when he conducted his allocation study, it is not possible to determine the accuracy of this statement. However, the KGAL(FM) upgrade application was on file with the Commission and a copy was available for public inspection at the time he filed his rulemaking request.

² Station KWAX(FM) is licensed to the State of Oregon/State Board of Higher Education. Mr. Sturdevant claims he is a contributor and a member of the station. However, he makes no claim nor does he submit any documentation that he is authorized to speak on behalf of the licensee or the station.

Oregon, where it also has a permit to build a new FM translator on FM Channel 229 (See BPFT-911224TB); and that the Commission's action will allow KGAL(FM) to abandon the Brownsville market.

The Petitioner asserts that the unique classical and cultural format of Station KWAX(FM) warrants its continued carriage over its FM translator station in Coos Bay and on its proposed translator station in Reedsport when that facility is constructed. Apparently aware that Station KWAX(FM) could shift the operations of its translator stations in Coos Bay and Reedsport to other FM frequencies, Mr. Sturdevant claims that Station KWAX(FM) lacks the funding for these minor modifications.

Finally, Mr. Sturdevant makes the gratuitous observation that the KGAL(FM) upgrade application "...seems contrary to the public interest", claiming it will result in an abandonment of service to Brownsville, Oregon.

**Petitioner's Petition is Procedurally
Defective and Fails to Raise Any
New or Relevant Facts Not Previously Considered**

Petitioner, citing Section 1.429(b) (1) and (2) of the Commission's Rules, contends that changed circumstances have occurred since he was last afforded an opportunity to comment on the action taken by the staff. Specifically, Petitioner claims the staff's decision to use an alternative channel is a "changed circumstance"; and that he should have been given an opportunity to first comment on the staff's decision to allocate Channel 228A in substitution for Channel 271A. Petitioner also claims that the Commission was denied the benefit of his reasons for selecting Channel 271A, as opposed to Channel 228A. As set forth below none of these arguments support his request for relief and his Petition should be rejected.

While Petitioner was not afforded an opportunity to comment on the staff decision to allocate Channel 228A, that is not a "changed circumstance" which gives rise to the right to challenge the Commission's action in this matter. Selecting channels other than those proposed by a petitioner in order to accommodating other applications and rulemaking proposals effected by the allocation process is a proper and legitimate exercise of staff discretionary authority. See Report and Order in MM Docket No. 91-348, released August 4, 1992. It is not an administrative function which obligates the agency to consult with outside parties. Unlike rights in an authorized facility, a petitioner for a new FM channel has no vested or private right to have the channel of his choice assigned to a particular community. Rather, it is the overall right of a community to expanded service and the rights of existing or proposed full service stations which must be taken into

consideration.

In weighing and balancing these rights, the ultimate decision to select and allocate a new channel resides within the administrative discretion of the Commission. In exercising that discretion, the Commission is under mandate to fairly, equitably, and efficiently distribute frequencies, consistent with the public interest standard of the Communications Act of 1934. The discretionary selection of "alternative channels" to accommodate proposals which might otherwise conflict is fully consistent with the Commission's statutory mandate.

Petitioner claims that the Commission was denied the benefit of his reasons for selecting Channel 271A and now offers those in support of his petition. This argument is untimely and irrelevant. Even if Mr. Sturdevant's reasons for selecting Channel 271A were relevant to this proceeding (which they are not), they do not constitute new facts. Obviously, his reasons were known to Mr. Sturdevant at the time he filed his rulemaking request. Having chosen not to declare his reasons for choosing Channel 271A in his petition or later comments, he cannot be heard now to complain he was denied the opportunity to present that information to the Commission. Accordingly, Petitioner has failed to demonstrate any new facts warranting reconsideration of the Commission's decision to allocate Channel 228A to Coos Bay, Oregon.

Petitioner Lacks Standing
to Assert Claims on Behalf
of the State of Oregon and Station KWAX(FM)

The substance of Mr. Sturdevant's petition is that the decision to allocate FM Channel 228A to Coos Bay will result in the disruption of FM translator service provided by Station KWAX(FM) to Coos Bay and similarly proposed service to Reedsport, Oregon. Yet, Mr. Sturdevant does not claim to represent Station KWAX(FM), nor has the license of the station, the State of Oregon/State Board of Higher Education, stepped forward to voice or affirm any of the concerns raised by Mr. Sturdevant.

Mr. Sturdevant makes an ambiguous claim that he is a "member of and contributor to KWAX." However, he offers no evidence that his status as a "member and contributor" authorizes him to speak on behalf of the State of Oregon or Station KWAX(FM). Accordingly, the champertous claims of the Petitioner relating to the FM translator interests of Station KWAX(FM) should be stricken.

Regardless of Petitioner's standing to assert defenses on behalf of the State of Oregon, it is well established that FM translator operations are "secondary services" only which are subject to and may be preempted by any enhancement to a primary FM broadcast station. Thus, where an FM translator operation, e.g. K226CW and K229AB, conflicts with the development or expansion of

a primary FM station proposal, e.g. the KGAL(FM) upgrade, the primary station proposal must prevail. See Memorandum Opinion and Order (FCC 93-338), released July 28, 1993, in MM Docket 88-140, regarding Amended Rules Re FM Translator Stations. Clearly Station KGAL(FM)'s proposed upgrade to a full C-1 station is unquestionably superior to the interests of the secondary service provided by the KWAX(FM) translator.

Even assuming that Petitioner's concern for the continued operation of translator service by Station KWAX(FM) to Coos Bay was legitimate, the KGAL(FM) upgrade does not preclude the use of other available FM frequencies in that area for translator operations by Station KWAX(FM).³ Petitioner does not deny that other frequencies may be available to Station KWAX(FM) for translator operations in Coos Bay and Reedsport. Instead, he seems to concede that frequencies are available but volunteers on behalf of Station KWAX(FM) that it "lacks the funding" to find and shift to new channels. Again Petitioner offers no basis for his authority to speak to the financial position of the station, or the basis for his knowledge of the financial condition of Station KWAX(FM).

**Petitioner's Challenge to the KGAL(FM)
Upgrade Application is Unsupported**

Ostensibly Mr. Sturdevant's petition is based on his resentment over the Commission's arbitrary decision not to confer with him before announcing the selection of an alternative channel in Coos Bay. While he evinces a fawning concern over the alleged disruption of FM translator service to Coos Bay, the real point of Mr. Sturdevant's petition is to challenge the upgrade application of Station KGAL(FM).

Petitioner avoids any direct attack on the KGAL(FM) application, offering only the tentative view that the proposal "seems to be contrary to the public interest" as it would allow the station to abandon their small market (Brownsville, Oregon) for the larger market of Eugene, Oregon. Mr. Sturdevant also suggests that the KGAL(FM) proposal will result in a loss of service to the communities of Albany, Corvallis and Lebanon.

Petitioner's claims are baseless as the KGAL(FM) proposal will not only greatly expanded the station's existing service, it will continue to provide city grade service to Brownsville. Moreover, the station will continue to maintain a sales office and meaningful presence in the Brownsville community. In short, the upgrade proposal is fully consistent with all Commission rules and policies

³ Given that Station KWAX(FM) is a non-commercial station it is entitled to seek translator operations on both commercial and non-commercial frequencies.

governing upgrade applications.

Mr. Sturdevant's throwaway claim that the KGAL(FM) upgrade will somehow result in loss of service to 100,000 persons in the communities of Albany, Corvallis and Lebanon, Oregon is unmitigated nonsense. As a Class A facility, Station KGAL(FM) has never been authorized sufficient power to provide service to any of these communities. Having never provided service to these communities, it is difficult to conceive how the KGAL(FM) upgrade will now result in a loss of service to them. On the contrary the KGAL(FM) application clearly shows that its proposed coverage from its new transmitter site will actually increase service over and beyond that presently being provided.

Respectfully submitted

C & C BROADCASTING, INC.


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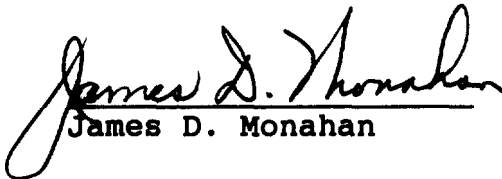
CERTIFICATE OF SERVICE

I, James D. Monahan, hereby certify that a true copy of the foregoing "Comments on Petition for Reconsideration" was mailed, postage prepaid, this 25th day of August to:

Michael C. Ruger
Chief, Allocations Branch
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